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In The

# Supreme Court of the United States

October Term, 1989

RICHARD K. JACQUIN,

*Petitioner,*

*vs.*

WALTER STENZIL, Warden, Nassau County Correctional Center,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## BRIEF FOR RESPONDENT

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No. 1287

In The

# Supreme Court of the United States

October Term, 1989

RICHARD K. JACQUIN,

*Petitioner,*

*vs.*

WALTER STENZIL, Warden, Nassau County Correctional Center,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.*

## BRIEF FOR RESPONDENT

### OPINIONS BELOW AND STATEMENT OF JURISDICTION

The petitioner has sufficiently set forth the opinions of the courts below which are reproduced as appendices to the petition. The basis upon which certiorari jurisdiction is asserted is adequately stated.

## STATEMENT OF THE CASE

On May 6, 1983 petitioner, Richard K. Jacquin, was observed by officers of the Alcohol Safety Patrol of the Nassau County Police Department operating his automobile erratically and in the wrong lane of traffic. The petitioner was stopped by the police but refused the officers' requests that he submit to roadside sobriety testing. The petitioner was placed under arrest for driving while intoxicated[1] and transported to a police facility (the Central Testing Unit) where, under controlled conditions, persons suspected of driving while intoxicated perform an array of physical exercises intended to reveal the degree of their inebriation. Before he was advised of his rights pursuant to *Miranda v. Arizona,* 384 U.S. 436 (1966), the petitioner was asked to walk a straight line, touch his fingers to his nose while leaning backward, and to retrieve coins from the floor and place them on the edge of a table. In the course of the testing procedure, which was recorded on videotape, the following conversation occurred:

> [Police Officer John McCormick] . . . is Officer McCormick, a breathalyzer technician with the Police Department, County of Nassau. The time is now 1:50 a.m. May 6, 1983. What is your name?
>
> [The petitioner, Richard K. Jacquin]: Richard.
>
> McCormick: Richard what?
>
> Petitioner: Richard Jacquin.
>
> McCormick: And how old are you?
>
> Petitioner: Fifty-six.

---

1. New York Vehicle and Traffic Law § 1192(3).

McCormick: And where do you live?

Petitioner: 170-06 Crocheron Avenue.

McCormick: All right, at 1:00 a.m. May 6, 1983 you were arrested by Police Officer [Schneider], Shield #638, of the Highway Patrol Bureau, for driving while intoxicated. The arresting officer has also advised you of the consequences of your refusal to submit to a chemical test for intoxication. At 1:45 a.m. you indicated your refusal to submit to a breath test.

Petitioner: Right.

McCormick: All right. Now, Mr. Jacquin, you . . . have refused to take a breathalyzer test, is that right?

Petitioner: That's right.

McCormick: And you have been told that because of your refusal your driver's license would be suspended, is that correct?

Petitioner: That's right.

McCormick: How long have you had your driver's license?

Petitioner: Gee . . . many years.

McCormick: And do you own a car?

Petitioner: Yes.

McCormick: And, when did you get your driver's license?

Petitioner: When I was [unintelligible] . . . it was many years ago.

McCormick: And do you need your license to get to work?

Petitioner: Yes I do.

McCormick: And knowing that your license will be suspended do you still refuse to take the test?

Petitioner: Yes.

McCormick: All right. Do you have any injuries sir?

Petitioner: Pardon?

McCormick: Do you have any injuries?

Petitioner: Ah, not at the . . . not at the moment anyway.

McCormick: Are you using any medication?

Petitioner: No.

McCormick: Are you a diabetic?

Petitioner: No, not that I know of.

McCormick: All right —

Petitioner: I broke my back . . . I mean, I don't know if I'm disabled . . . I don't think so.

McCormick: Okay, sir, will you follow me down this line. Right here. Face this direction. All right. The first thing I want you to do, I want you to walk along this line in this fashion, heel-to-toe. All right?

Petitioner: Yeah.

McCormick: When you get down to the end of that line I want you to turn on the line, right, about face, and walk back heel-to-toe.

Petitioner: Where did you want me to do that?

McCormick: On this line here.

Petitioner: Turn around?

McCormick: Yes. Okay, Now step over here. All right. Now I'm going to place these coins on the floor and I want you to pick them up one at a time and place them onto this desk, heads up, half on and half off.

Petitioner: Right, I . . . I should use my glasses but [unintelligible] .. but you took my glasses away.

McCormick. All right just put them up there half on and half off onto the desk one at a time.

Petitioner: What does that mean "half on and half off?"

McCormick: What I just demonstrated to you, sir.

Petitioner: I don't know what that means, "half on and half off."

McCormick: All right, the coins were just placed up on the desk, not half on and half off. All right. I want you to just stand on the end of this line here. All right. I want you to do this. I want feet together and hands at your side. All right. Now watch me. All right, just look at me. I want you to put your head back and close your eyes and just hold that position, head all the way back. Okay. And now, turn and face me. All right.

Petitioner: Same way? Or . . .

McCormick: No. Face me.

Petitioner: Oh, face you.

McCormick: All right. Feet together . . .

Petitioner: Yeah.

McCormick: Hands at your side. Head back, eyes closed, just like that. Head all the way back. Okay. Open your eyes and face this direction again. All right. Now I want you to do this: Place your arms out, the index fingers extended. All right. Head back with your eyes closed. I just want you to touch the tip of your nose. Right hand, then your left.

> Petitioner: Right hand and then your left? Right hand?
>
> McCormick: Right. Now the left. Okay. All right. This completes the performance test. Okay. Want to follow me?

The petitioner was ultimately indicted on a felony charge of driving while intoxicated. New York Vehicle and Traffic Law §§ 1192(3), 1193(c). Prior to trial, he moved to suppress the entire sound portion of the videotape, claiming that this colloquy amounted to custodial interrogation in violation of his *Miranda* rights. At the conclusion of the hearing, the petitioner argued that all of his statements recorded on the videotape should be suppressed, with the exception of his refusal to submit to the chemical analysis of his breath.[2] The court inquired: "Just what statements were made on that videotape that you think are subject to *Miranda* rulings?" The petitioner replied, "Any conversation . . . beyond [that relating to the] refusal." In reply, the court noted "that is what we very often do . . . just edit that portion of it and show the performance tests."

The trial court nevertheless denied the motion in its entirety. Acknowledging that it was petitioner's position that all conversations beyond refusal were required to be suppressed in the absence of the prior waiver of his *Miranda* rights, the court held that "[N]o express questioning [had occurred] during the tests requiring verbal responses by the [petitioner] unless he did not understand the instructions of the testing officer" and, that such "exchange of conversation" as did occur was not the functional equivalent of interrogation. The videotape was played

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2. *Cf. South Dakota v. Neville*, 459 U.S. 553 (1983).

in its entirety before the jury[3] and the petitioner was convicted as charged.

The petitioner appealed from this judgment to the Appellate Division of the Supreme Court of New York ("Appellate Division"). He argued, *inter alia,* that with the exception of the questions and answers on the videotape regarding the chemical testing of his breath, the remainder of the colloquy preserved on the tape was admitted into evidence in violation of his federal constitutional rights. The state opposed solely on the merits and the Appellate Division affirmed the judgment without reference to the issue. *People v. Jacquin,* 124 A.D. 2d 594 (2nd Dept. 1986).

The petitioner obtained permission to appeal to the New York State Court of Appeals from an associate judge of that court. The admissibility of the sound portion of the videotape was the principal claim and the issue was joined by the parties exclusively on the merits. Initially, the court specifically noted that the trial court's determination that the audio/visual tape should not be suppressed was upheld by the Appellate Division. The court further ruled that "any colloquy between the test-giver and the defendant not constituting custodial interrogation" preserved in an audio/visual record of physical performance tests was admissible even if it was not preceded by the *Miranda* warnings. The court went on to state that because the petitioner had moved to suppress "audio portions of the tape generally" rather than identifying "the specific questions and answers he found objectionable" the petitioner had failed to preserve the issue for appellate review under applicable state law. *People v. Jacquin,* 71 N.Y. 2d 825, 826-27 (1988).

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3. Certain documentary evidence which duplicated some of the material already ruled admissible *via* the sound portion of the videotape was admitted into evidence without objection.

The petitioner then applied to the United States District Court, Eastern District of New York (Mishler, J.) pursuant to 28 U.S.C. § 2254 for a writ of habeas corpus, alleging, *inter alia*, that the admission of the sound portion of the videotape violated his rights under the Fifth Amendment. The court dismissed the petition, holding simply "it is not within the authority of this court to review the propriety of a declaration of state procedural law by [a] state's highest court." The court then concluded that the underlying constitutional question was not so "novel" a claim as to justify petitioner's failure to have formulated it with the necessary concreteness to satisfy state preservation rules. *Cf. Wainwright v. Sykes*, 433 U.S. 72 (1977). The court also noted that petitioner's failure to object to the admission of other evidence duplicative of the already-admitted videotape was an additional bar to consideration of the merits of the claim in habeas corpus. The United States District Court nevertheless granted a certificate of probable cause to appeal pursuant to 28 U.S.C. § 2253. The United States Court of Appeals for the Second Circuit affirmed the District Court's denial of the writ. Ruling that the merits of a state procedural bar does not in and of itself present a federal question, the court found that since certain of the videotape statements were admissible pursuant to the pedigree exception and, since petitioner did not identify the specific questions and answers he found objectionable, despite the "prodding" of *nisi prius* to articulate "a more specific objection," the petitioner violated a state procedural rule requiring specificity — a rule, they concluded, petitioner could reasonably have anticipated would apply to his case.

## SUMMARY

The New York State Court of Appeals ruled that the petitioner was procedurally barred from raising a federal constitutional claim before that court because he violated a state procedural rule requiring that objections to the admission of evidence be made to a trial court with sufficient specificity to alert the court to the legal basis of the claim.

The United States District Court for the Eastern District of New York and the Second Circuit Court of Appeals held that they were without authority to review the merits of a state court's declaration of procedural default. Upon examination of the default both courts concluded that the petitioner could not satisfy the test of *Wainwright v. Sykes,* 433 U.S. 72 (1977) and denied petitioner's request for the writ of habeas corpus.

The petitioner claims that his constitutional right against self-incrimination was violated when, absent the waiver of his rights pursuant to *Miranda v. Arizona,* 384 U.S. 436 (1966), he was compelled to exhibit verbal behavior which revealed the degree of intoxication, an element of the crime charged. This Court has accepted a case which appears to present this issue *Pennsylvania v. Munoz,* No. 89-213 leaving nothing on the merits of petitioner's case independently to be decided.

## ARGUMENT

### I.

### THE PETITION FOR THE WRIT OF CERTIORARI SHOULD BE DENIED.

The petition presents two questions: (A) whether a habeas corpus court may reach the merits of a constitutional claim upon a finding that a state court had erroneously applied an otherwise facially valid and historically established procedural default rule to the particular facts and circumstances of the case; and (B) whether a videotape recording of speech behavior, obtained without the waiver of rights pursuant to *Miranda v. Arizona,* 384 U.S. 436 (1966), is admissible at the trial of a person accused of driving while under the influence of alcohol, as proof of the degree of intoxication.

**A. The court below properly refused to examine the propriety of the state court's application of a state procedural default rule.**

The New York State Court of Appeals and the Second Circuit Court of Appeals ruled that certain established exceptions to the forms of custodial interrogation that constitute "compelled testimonial self-incrimination" for *Miranda* purposes applied to offenses based on the extent to which physical competence, including linguistic, is affected by alcohol. The New York State Court of Appeals based its finding of procedural default on the ground that these exceptions were applicable to petitioner's case and, that petitioner had therefore "failed to identify the specific questions and answers he found objectionable." *People v. Jacquin,* 71 N.Y. 2d 825, 826 (1988). The Second Circuit Court of Appeals held that the state rule was reasonably applied to the facts of petitioner's case and that the application of this rule was not so novel that petitioner could not have reasonably anticipated he

risked procedural default by the form of his objection.[4] This conclusion reflects the proper scope of federal habeas corpus review of whether a state court procedural default bars review of the merits of a constitutional claim. Thus, the application for the writ of certiorari should be denied.

When a state's highest court of review asserts a procedural default rule as a basis for decision, it is well-established that a federal question is presented as to whether the rule amounts to "an adequate and independent state ground" of decision to preclude review of the merits in federal court. *Johnson v. Mississippi*, ____ U.S. ____, 108 S. Ct. 1981, 1987 (1988); *Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982). This rule received its modern formulation in habeas corpus [*Henry v. Mississippi*, 379 U.S. 443, 447 (1965)] and was restated in *Wainwright v. Sykes*, 433 U.S. 72, 85-86 (1977)[5] to permit a federal court to proceed to the merits of a constitutional claim upon a finding that the state procedural rule was in some measure "inadequate," without requiring satisfaction of the cause and prejudice test.[6] *See Reynolds v.*

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4. Before trial, petitioner moved generally to suppress the entire sound portion of the videotaped performance tests because no *Miranda* warnings had been given before he was questioned. Although asked to particularize his objection by the trial judge, petitioner's counsel refused to designate which questions and answers offended Fifth Amendment requirements.

5. In *Wainwright* the court accepted the state's contention that the Florida rule of preservation *as applied* to Sykes's case, was "quite consistent with a line of Florida authorities interpreting the rule in question." The petitioner was therefore required to satisfy the "cause and prejudice" test of *Francis v. Henderson*, 425 U.S. 536 (1976).

6. The distinction is substantial since the "prejudice" test requires that a petitioner demonstrate that the error "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions"

(Cont'd)

*Ellingsworth,* 843 F.2d 712, 717 (3rd Cir. 1988). The limits of inquiry into the "adequacy" of a state procedural rule is not entirely clear. Generally, a federal court is bound by a state's constructions of its own law.[7] Hence, a federal court is required to accept a state court's characterization of the existence of a state preservation rule along with "the content attributed to it by the court." *Middleton v. Cupp,* 768 F.2d 1083, 1086 (9th Cir. 1985), *cert. denied, 478 U.S. 1021 (1986); Wilson v. Jones,* 723 F. Supp. 629, 632 (N.D. Ala. 1989) ["federal courts have traditionally allowed state courts to have the final say on their own procedural rules . . ."]. *Cf. Jacquin v. Stenzil,* 886 F.2d 506 (2d Cir. 1989). On the other hand, this Court has recently held that state constructions of matters of state law will not be disturbed where they are "reasonable," implying both a finite boundary to the extent to which state pronouncements on state law need be respected and, that a federal court is empowered to determine whether, as a matter of federal law, a state construction of state law, in a particular case, was so "unreasonable" as to permit

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(Cont'd)

[*Holland v. Scully,* 797 F.2d 57, 69 (2d Cir.), *cert. denied,* 479 U.S. 870 (1986) *citing United States v. Frady,* 456 U.S. 152, 170 (1982)], a more demanding standard than a harmless error test. *See Murray v. Carrier,* 477 U.S. 478, 493-94 (1986). Petitioner does not claim that the error in his case resulted in the conviction of someone "actually innocent," a showing that would also permit bypass of the cause and prejudice test. *Smith v. Murray,* 477 U.S. 527, 537 (1986). The contours of the "cause" prong was a matter expressly left to future cases for definition (*Wainwright v. Sykes, supra* at 87) and courts have generally limited findings of "cause" to where the constitutional claim was "reasonably unknown" to petitioner or where some "objective factor," such as official interference, rendered compliance with the default rule impracticable. *Amadeo v. Zant,* 486 U.S. ____, 108 S. Ct. 1771, 1776 and citations therein.

7. *Mullaney v. Wilbur,* 421 U.S. 684, 691 & n.11 (1975) [state courts are the "ultimate expositors of state law" except in "extreme circumstances" such as where consideration of a federal claim is avoided by an "obvious subterfuge."].

the federal court to reach the merits of the underlying claim. *Ricketts v. Adamson,* ____ U.S. ____, 107 S. Ct. 2680, 2683-84 and n. 3 (1987). Moreover, since a federal habeas court is not bound by conclusions of evidentiary fact not fairly supported by record, including those made by a state appellate court [28 U.S.C. § 2254(d); *Sumner v. Mata,* 449 U.S. 539, 544-47 (1981)], it follows that a federal habeas corpus court may (1) inquire as to whether a state appellate court's findings as to the facts and circumstances of an appellant's procedural default are fairly supported by the record, and (2) whether a state appellate court's conclusion that a pre-existing state rule of preservation applied to those "procedural facts" was "reasonable". *Compare County Court of Ulster County v. Allen,* 442 U.S. 147, 149-53 (1979).

However, absent a claim of a "fundamental miscarriage of justice," a petitioner's options for obtaining federal review of the propriety of the state's procedural bar should be limited to one of the grounds — the constitutional claim was "reasonably unknown" or an "objective factor" rendered compliance with default rule impracticable — enunciated in *Amadeo v. Zant, supra. See e.g., Johnson v. Trickery,* 882 F.2d 316, 320 (8th Cir. 1989). Notwithstanding petitioner's claim to the contrary, the federal courts were required to inquire no further into the propriety of the state default and correctly declined to review the state's construction of its own law. The petitioner has never claimed that the state preservation rule was facially an improper vehicle to bar state-court consideration of federal constitutional claims, that it had not been "strictly or regularly" applied, or that he was prevented, by some "objective factor" from complying with its terms. The federal courts below correctly held that upon these facts, the only issue for their review was whether the application of the rule to his case could not reasonably have been anticipated. *Reed v. Ross,* 468 U.S. 1, 16 (1984). Inasmuch as the court below correctly answered that question in the affirmative, petitioner's application for a writ of certiorari should be denied.

**B. This Court should not review the merits.**

Petitioner was compelled to submit to physical performance tests without having received the *Miranda* advisements. Videotape recordings of these tests usually memorialize the suspect's speech behavior as he or she responds to questions or instructions ancillary to the administration of non-verbal coordination tests. If a suspect's verbal behavior, such as the capacity to articulate speech, to express oneself coherently and appositely, and to recall information has degraded in a manner corresponding to what a juror or other fact finder associates with the effects of the consumption of intoxicants, evidence of such speech derangement, preserved on the sound portion of a videotape, may, as in petitioner's case, support proof of guilt. However, because the compelled production of mere physical evidence is generally exempted from the *Miranda* requirement [*Schmerber v. California,* 384 U.S. 757 (1966)] including, for limited purposes, speech acts [*United States. v. Wade,* 388 U.S. 218 (1967)], the verbal component of physical coordination testing has been ruled admissible by many state courts and at least two federal jurisdictions. In *People v. Roadifer,* 346 N.W. 2d 438 (S.D. 1984) and *Commonwealth v. Brennan,* 438 N.E. 2d 60 (Mass. 1982), the courts admitted the evidence because the content of the suspect's responses was not "inherently" incriminating. In *Jacquin v. Stenzil,* 886 F.2d 506 (2d Cir. 1989), *Edwards v. Gray,* 688 F.2d 91 (10th Cir. 1982) and *Commonwealth v. Mahoney,* 510 N.E. 2d 759 (Mass. 1987), the courts ruled these statements to be merely "pedigree" and responses to the "booking procedure." Finally, in *McAvoy v. State,* 523 A.2d 618 (Md. 1987) and *State v. Brandenberg,* 534 N.E. 2d 906 (Ohio 1987), the courts admitted the statements holding that the purpose of the questioning was not to elicit responses relating to the elements of the crime but "merely" to display the subject's physical condition.

Several state jurisdictions have taken a contrary position,

asserting, as did petitioner at his state court suppression hearing, that in prosecutions where the accused's physical condition is the gravaman of the offense, the admission of *any* compelled speech evidence amounts to a Fifth Amendment violation absent the prior waiver of the *Miranda* rights. *Commonwealth v. Waggoner,* 540 A.2d 280 (Pa. 1988); *Miffleton v. State,* 728 S.W. 2d 880 (Tex. 1987); *State v. Nece,* 501 A.2d 1049 (N.J. 1985); *People v. Fenelon,* 303 N.E. 2d 38 (Ill. 1973).

In *Pennsylvania v. Bruder,* ____ U.S. ____, 109 S. Ct. 205 (1988) this Court expressly reserved the question of whether a verbal sobriety test, in response to "unwarned" custodial interrogation, is testimonial and therefore inadmissible pursuant to *Miranda*. Thereafter, on October 19, 1989, this Court decided to address this issue and granted certiorari in *Pennsylvania v. Munoz,* No. 89-213. Accordingly, although petitioner's substantive claim presents an issue of constitutional significance that has received inconsistent analysis in various state courts and two federal circuits, certiorari should be denied both because the issue is already before this Court and because review is otherwise procedurally barred.

## CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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